Supreme Court, U.S.
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NO. 94 537

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CHAD GODFREY,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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17 pp

QUESTION PRESENTED

I. Whether the Fifth Circuit Court of Appeals' ruling that the same conduct of a defendant can be double-counted under the United States Sentencing Guidelines if it is not expressly forbidden:

a) Is in conflict with the Sixth Circuit Court of Appeals decision in United States v. Romano, infra;

b) Is constitutionally infirm in that it is in violation of the Double Jeopardy Clause and offends due process.

LIST OF PARTIES IN APPELLATE COURT

Chad Godfrey,

Appellant,

United States of America,

Appellee

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST OF PARTIES IN APPELLATE COURT.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
TABLE OF CONTENTS OF APPENDIX TO THE PETITION.....	vi
REFERENCE TO OPINIONS OF LOWER COURTS.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISION AT ISSUE.....	2
STATEMENT OF THE CASE.....	3
ARGUMENT.....	6
I. THE COURT'S HOLDING THAT THE SAME CONDUCT CAN BE PUNISHED JOINTLY AND SEVERALLY UNDER TWO SEPARATE PROVISIONS OF THE SENTENCING GUIDELINES IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL	
CONCLUSION.....	10

TABLE OF AUTHORITIES

Cases	Page
Busic v. United States, 446 U.S. 398 (1980)	8
Simpson v. United States, 435 U.S. 6 (1978)	8
United States v. Romano, 970 F.2d 164 (6th Cir. 1992)	i,7,8
United States v. Werlinger, 894 F.2d 1015 (8th Cir. 1990)	8
Title 18 U.S.C. § 2	3
Title 18 U.S.C. § 371	3
Title 18 U.S.C. § 656	3
Title 18 U.S.C. § 1344	3
Title 18 U.S.C. § 1956(a)(1)(A)	3
Title 18 U.S.C. § 2314	3
Title 18 U.S.C. § 3742	1
Title 28 U.S.C. § 1254(1)	1
Title 28 U.S.C. § 1291	1

U.S. Supreme Court Rule 10..... 1

U.S. Supreme Court Rule 10.1(a)..... 7

U.S.S.G. Chapter 2..... 6

U.S.S.G. § 2F1.1..... 6,7

U.S.S.G. § 2F1.1(b)(2)..... 7

U.S.S.G. Chapter 3..... 6

U.S.S.G. § 3B1.1..... 6,7

U.S.S.G. § 3B1.1(a)..... 7

TABLE OF CONTENTS OF THE APPENDIX TO THE PETITION

	Page
Cover.....	A-1
Table of Contents.....	A-2
Opinion of The Fifth Circuit Court of Appeals.....	A-3

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REFERENCE TO OPINIONS OF LOWER COURT

The opinion of the Fifth Circuit Court of Appeals is reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The panel's order was entered on June 24, 1994. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISION AT ISSUE

1. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states:

> "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

2. The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be deprived of . . . liberty . . . without due process of law."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States district court for the Southern District of Texas, Houston, Division.

The Petitioner, Chad Godfrey, was indicted on April 10, 1992, by a federal grand jury in the Southern District of Texas. The indictment charged him in Count One with conspiracy to violate the laws of the United States in respect to bank fraud and misapplication by a bank officer, in violation of 18 U.S.C. § 371; in Counts Two and Four with aiding and abetting money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a)(1)(A); in Counts Three, Eight, Nine and Ten with aiding and abetting the transportation of stolen goods, in violation of 18 U.S.C. §§ 2 and 2314; in Counts Five, Six and Seven

with aiding and abetting misapplication by a bank officer, in violation of 18 U.S.C. §§ 2 and 656; and in Count Eleven with bank fraud, in violation of 18 U.S.C. § 1344.

On October 23, 1992, Petitioner appeared before the Honorable Sim Lake and entered a plea of guilty to Count One of the indictment.

The Pre-Sentence Investigation Report revealed that Petitioner and several co-conspirators devised a scheme whereby they would create shell companies to purchase controlling interests in several ailing Texas banks with small amounts of money, then cause the management of the target banks to purchase worthless debentures issued by companies owned by co-defendant James Barrus, Jr.

The proceeds from the debenture sales would be deposited in accounts held by

Barrus-controlled entities and used to purchase additional distressed banks. The conspirators would crate counterfeit certificates of deposit and phony financial statements prepared by non-existent accounting firms to create the appearance of financial assets and fraudulently obtained loans for the acquisitions.

Furthermore, Petitioner was alleged to be the leader of one of the two groups operating during the scheme. He purportedly instructed other co-conspirators to carry out the purchase of at least two banks.

The Petitioner was sentenced under the United States Sentencing Guidelines, whereby he was sentenced to confinement for a total of twenty-one (21) months.

ARGUMENT

I.

THE COURT'S HOLDING THAT THE SAME CONDUCT CAN BE PUNISHED JOINTLY AND SEVERALLY UNDER TWO SEPARATE PROVISIONS OF THE SENTENCING GUIDELINES IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL

The United States Sentencing Guidelines calculates a sentence based upon offense conduct relative to a defendant and that defendant's role in the offense. See U.S.S.G. Chapters 2 and 3. In the instant case, the Fifth Circuit utilized the same conduct of Petitioner in assessing both the offense conduct (U.S.S.G. §2F1.1) and his role (U.S.S.G. § 3B1.1), thus double-counting the conduct in such a manner which increased his punishment. The Court held that double-counting is permissible under the guidelines. Specifically, the Court's finding that Petitioner could receive a

sentence enhancement under both U.S.S.G. § 2F1.1 and § 3B1.1, is in conflict with another circuit court of appeal and merits review by this Honorable Court. See United States Supreme Court Rule 10.1(a).

Section 3B1.1(a) U.S.S.G. provides a sentence enhancement for a defendant who played an aggravating role in the criminal activity. Section 2F1.1(b)(2) provides a sentence enhancement if a defendant engaged in more than minimal planning or engaged in a scheme to defraud more than one victim. (Both ways certainly implicate greater culpability on the part of the perpetrator).

In United States v. Romano, 970 F.2d 164 (6th Cir. 1992), the Sixth Circuit Court of Appeals held that application of both § 3B1.1(a) and § 2F1.1(b)(2) to the same defendant is improper because it punishes the same conduct. The Court

further held that it violates established principles of lenity and due process to enhance a defendant's sentence again for the same conduct. Id.

The Eighth Circuit Court of Appeals has held that the Sentencing Commission did not intend for the same conduct to be punished cumulatively under separate Guidelines provision. United States v. Werlinger, 894 F.2d 1015, 1017 (8th cir. 199). The Werlinger court further stated that imposing a rule against double counting is consistent with this Honorable Court's decisions that have required a clear expression of legislative intent to apply sentence enhancement provisions cumulatively. Id. (citing Busic v. United States, 446 U.S. 398 (1980); and Simpson v. United States, 435 U.S. 6 (1978)).

In the absence of legislative intent, and in accordance with the general rule of

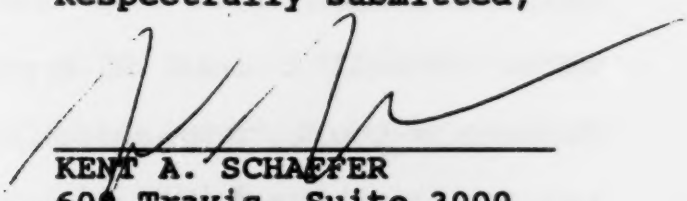
lenity in criminal cases, it is improper to double-count the same conduct under the sentencing guidelines. Furthermore, to punish the same conduct twice is clearly a violation of the Double Jeopardy clause.

The panel has rendered an opinion applying the United States Sentencing Guidelines in an unconstitutional manner, which is in conflict with the decisions of other circuit courts of appeals and this Honorable Court. Therefore, a compelling basis exists for this Court to grant the instant Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reason, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit Court of Appeals, vacate the sentence, and remand the cause for re-sentencing.

Respectfully submitted,



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APPENDIX TABLE OF CONTENTS

	Page
Cover.....	A-1
Table of Contents.....	A-2
Opinion of The Fifth Circuit Court of Appeals.....	A-3

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2717
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHAD GODFREY,

Defendants-Appellants.

Appeal from the United States
District Court for the
Southern District of Texas

(June 24, 1994)

Before WISDOM, JOLLY, and JONES, Circuit Judges. WISDOM, Circuit Judge:[1]

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[1] Most of this opinion merely decides this particular case based on well-settled principles of law and is unworthy of publication. *See* Loc. R. 47.5. The appeal raises one question of precedential significance. We direct that only the

Defendants/Appellant Chad Godfrey pleaded guilty to one count of conspiracy to commit bank fraud and misapplication of funds by a bank officer in violation of 18 U.S.C. § 371. The district court, after departing downward from the sentence range suggested by the Sentencing Guidelines, sentenced Godfrey to 21 months in prison. On three grounds, Godfrey challenges the district court's calculation of his sentence. We AFFIRM.

I.

Chad Godfrey and several co-conspirators[2] devised a scheme to siphon

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first and last paragraphs of the opinion and all of the parts II.A and II.B be published, with omissions i the published test to be indicated by asterisks. *See, e.g., Garcia v. Wash*, 20 F.3d 608 (5th Cir. 1994).

[2] Those indicated along with Godfrey were James Barrus, Jr., Elliot Bernstein, James Trodden, Gloria Manchester, and Fred Leroy Harwood. *See United States v. Harwood*, 20

money from failing financial institutions. We summarized the scheme in a recent opinion disposing of the appeal of one of Godfrey's co-conspirators:

> The conspirators concocted an elaborate scheme whereby they would create shell companies to purchase controlling interests in several ailing Texas banks with small amounts of money, then cause the management of the target banks to purchase worthless debentures issued by companies owned by Barrus [James Barrus, Jr., a co-conspirator]. The proceeds from the debenture sales would be deposited in accounts held by Barrus-controlled entities and used to purchase additional distressed banks. The conspirators created counterfeit certificates of deposit and phony financial statements prepared by nonexistent accounting firms to create the appearance of financial assets and fraudulently obtained loans to produce "show money" for the acquisitions.[3]

F.3d 469 (5th Cir. 1994) (table) (no. 93-2282, manuscript opinion at 2).

[3] *Id.*, manuscript opinion at 2.

Several examples illustrate Godfrey's involvement in the conspiracy. In 1987, Godfrey and some of his co-conspirators devised a plan to take over an offshore and a domestic bank, and then to siphon funds from the domestic bank tot he offshore bank. At Godfrey's instruction, Allan Swan purchased First London Bank, an institution of the British West Indies. Godfrey then recruited Jedd Jones to borrow $650,000 from Imperial Savings Association ("Imperial"). The conspirators planned to use that $650,000 to purchase the domestic bank. Jones, following Godfrey's instructions, falsely represented to Imperial that he intended to purchase a house with the $650,000. Instead of purchasing a house, however, Jones transferred the loan proceeds to New Horizons Financial, a group formed by Godfrey, Barrus, and other conspirators.

new Horizons Financial attempted unsuccessfully to purchase a bank with the loan proceeds. A later attempt by Barrus, Godfrey and the other conspirators to purchase First Bank of Balch Springs, another Texas bank, also failed.

In August 1988, the conspirators planned to purchase the Bank of Kerrville. Godfrey set up a meeting between co-conspirators Manchester and Bernstein to arrange for escrow. At the meeting, the conspirators agreed that the purchaser would be Metric Financial ("Metric"), a shell corporation created by the conspirators of which Godfrey was listed as the vice-president. Godfrey attended what was to have been the closing on the sale. The closing fell through when the Bank's representatives discovered that a financial statement for one of the conspirators' shell corporations had been

falsified.[4]

The conspirators tried again a month later. This time their target was Texana National Bank ("Texan"). Godfrey and Bernstein arranged for James Epley and Jere Sink to purchase Texana for $250,000. Texana, once under their control, was to purchase a $1.55 million debenture from Interim Financial Network ("Interim"), a shell corporation co-owned by Godfrey. The purchase was closed on September 23, 1988, following which Epley arranged for

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[4] The conspirators sought to make the Bank of Kerrville's purchase, for $28 million, of a $35-million-face-value debenture from Land Corporation of America ("Lancor"), a shell corporation, a condition of the sale. The Bank of Kerrville's representatives asked for a financial statement from Lancor. Barrus provided a financial statement that falsely represented that Lancor had some $1.3 billion in assets. upon investigation, the Bank of Kerrville's agents discovered that the accounting firm that had purportedly prepared the financial statement did not exist.

Texana to purchase the debenture from Interim. The proceeds of the debenture sale were funnelled through various shell corporations to manchester, Bernstein, and Godfrey. Godfrey's personal share was approximately $326,000.

In October 1988, Godfrey negotiated the purchase of Resource Bank for $611,000, and arranged for the bank to purchase a debenture from Land Corporation of America ("Lancor"), another shell corporation. To finance the purchase, Epley caused Texana to purchase a new debenture for $2.5 million, of which $650,000 was wired to Manchester, who used it to pay the stockholders of Resource Bank. Godfrey, Barrus, and Harwood attended the closing of the sale of Resource Bank. Resource Bank then purchased for $16 million a $20 million face value debenture from Lancor. Barrus

wired a portion of the funds to the conspirators' shell corporations.

A handful of other financial transactions occurred before the Officer of the Comptroller of the Currency (OCC) stepped in and issued a temporary cease and desist order against the conspirators. Godfrey and his co-conspirators were then charged on a multiple-count indictment with a variety of federal crimes. Godfrey reached a plea agreement with the prosecutors whereby he pleaded guilty to the conspiracy charge in exchange for the dismissal of the other counts. Godfrey also provided substantial assistance to the government following his plea bargain.

Godfrey's sentence was calculated as follows. To the base offense level of six,[5] the court added ten levels because

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[5] *See* U.S.S.G. § 2F1.1(a) (1988 Manual).

it determined that Godfrey was responsible for a loss between $2,000,001 and $5 million.[6] It then added two levels for Godfrey's more than minimal planning and involvement in a scheme to defraud more than one victim,[7] added four levels for Godfrey's role as a leader or organizer, [8] and subtracted two levels for Godfrey's acceptance of responsibility.[9] With a total offense level of 20 and a criminal history category of I, the guideline range was 33-41 months imprisonment. The district court overruled Godfrey's

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[6] *Id.* §2F1.1(b)(K). The district court accepted the probation officer's recommendation of a ten-level increase, but noted that even a thirteen-or fourteen-level increase would have been appropriate.

[7] *Id.* § 2F1.1(b)(2)(A), (B).

[8] *Id.* § 3B1.1(a).

[9] *Id.* § 3E1.1(a).

objections to the sentencing recommendations of the presentence investigation report (PSR). The government moved for a downward departure on the grounds that Godfrey had provided substantial assistance to the prosecution.[10] The district court departed downward and sentenced Godfrey to 21 months imprisonment. Godfrey appealed his sentence to this Court.

II.

A. Standard of Review

When reviewing a sentence, we ask whether the district court correctly applied the Sentencing Guidelines to factual findings that are not clearly erroneous.[11] The district court's

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[10] *See id.* § 5K1.1.

[11] *United States v. Montoya-Ortiz*, 7 f.3d 1171, 1179 (5th Cir. 1993). A factual finding is clearly erroneous if it is not

application and interpretation of the Sentencing Guidelines are matters of law subject to *de novo* review.[12]

B. "Double Counting" for Leadership and Planning

Godfrey first contends that the district court improperly "double counted" in adjusting his sentence level upward by four levels for being a leader or organizer under U.S.S.G. § 3B1.1(a) and by two levels for more than minimal planning and for involvement in a scheme to defraud more than one victim under § 2F1.1(b)(2).

We have previously noted that the Sentencing Guidelines do not forbid all double counting.[13] Double counting is

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plausible in light of the record taken as a whole. *See Anderson v. City of Bessemer City470 U.S. 564, 573-76 (1985).*

[12] *Montoya-Ortiz*, 7 F.2d at 1179.

[13] *United States v. Gonzales*, 996 F.2d 88, 93 (5th Cir. 1993).

impermissible only when the particular guidelines in question forbid it.[14] Because neither § 3B1.1 nor § 2F1.1 forbid double-counting with each other, increases under both of those sections are permitted. this is also the conclusion reached by most of the other circuits to address this question.[15] Previous unpublished decisions of this Court agree.[16]

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[14] *See id.* at 93-94.

[15] *See United States v. Myerson*, 18 F.3d 153, 163-64 (2d Cir. 1994); *United States v. Smith*, 13 F.3d 1421, 1429 (10th Cir. 1994); *United States v. Aideyan*, 11 F.3d 74, 76 (6th Cir. 1993); *United States v. Willis*, 997 F.2d 407, 418-19 (8th Cir. 1993), *cert. denied*, --- U.S. ---, 114 S.Ct. 704, 126 L.Ed.2d 670 (1994); *United States v. Kelly*, 993 F.2d 702, 704-05 (9th Cir. 1993); *United States v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991); *United States v. Boula*, 932 F.2d 651, 654-55 (7th Cir. 1991).

[16] *See United States v. Grube*, 20 F.3d 469 (5th Cir. 1994) (table) (manuscript opinion at 3-6); *United States v. Walker*, 981 F.2d 1255 (5th Cir. 1992) (table) (manuscript opinion at

We consider Godfrey's reliance on the Sixth Circuit's decision in *United States v. Romano*[17] misplaced. In *Romano*, the Sixth Circuit reversed a sentence that the district court had enhanced under both sections 3B1.1(a) and 2F1.1(b)(2) of the Sentencing Guidelines. The majority in *Romano* concluded that "by its very nature, being an organizer or leader of more than five persons necessitates more than minimal planning",[18] but the Sentencing Commission did not intend to punish the same conduct cumulatively under more than one provision of the Guidelines.[19] Therefore, the majority concluded,

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3).

[17] 970 F.2d 164 (6th Cir. 1992).

[18] *Id.* at 167.

[19] *Id.*

adjustments under both §§ 3B1.1(a) and 2F1.1(b)(2) were impermissible.

Even if we thought the rule of *Romano* could be squared with the jurisprudence of this Circuit (and we have serious doubts that it can), we find *Romano* distinguishable from Godfrey's case. Section 2F1.1(b)(2) allows a two-level increase if the defendant (A) engaged in more than minimal planning or (B) engaged in a scheme to defraud more than one victim. Only the first of those two options was at issue in *Romano*. The district court found, however, that Godfrey's conduct fitted *either* of the two options under § 2F1.1(b)(2). In such circumstances, even the Sixth Circuit does not follow the *Romano* rule, but instead permits cumulative increases under §§

2F1.1(b)(2) and 3B1.1(a).[20] The enhancement in Godfrey's case plainly was permissible.

C. Godfrey's Role as an Organizer or Leader

We next review for clear error the district court's finding that Godfrey acted as an organizer or leader of a criminal activity involving five or more participants, warranting a sentence level increase under U.S.S.G. § 3B1.1(a).

The evidence amply supports the district court's finding. Godfrey helped organize the planned 1987 takeover of a domestic bank and an offshore bank, recruiting and directing Allan Swan and Jedd Jones to accomplish the task. Godfrey helped organized the planned takeover of the Bank of Kerrville in August 1988. With Bernstein, he led the

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[20] *See Aideyan*, 11 F.3d at 76.

planed purchase of Texana National Bank the following month, directing the actions of James Epley and Jere Sink. He was a co-owner of the shell corporation from which Texana was induced to purchase a worthless debenture, and pocketed almost a third of a million dollars from the proceeds. He led the conspirators' purchase of Resource Bank in October 1988. On these facts, we cannot conclude that the district court's finding that Godfrey acted as a leader or organizer was clearly erroneous.[21]

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[21] The commentary to U.S.S.C. § 3B1.1(a) suggests several factors for the courts to consider in making the determination of whether a particular defendant was an organizer or leader. We consider the evidence that Godfrey acted as an organizer or leader so overwhelming that there would be n point in testing it against each of the enumerated factors, but of course we approve of their use by the district court.

To the extent Godfrey's argument can be read as a challenge to the district court's reliance on the findings of fact

D. The Amount of the Loss Attributable to Godfrey

Finally, Godfrey challenges the district court's finding that a loss of $2,867,952 was attributable to his conduct, warranting a ten-point increase in his sentencing level under U.S.S.G. § 2F1.1(b)(K). The district court calculated this amount by adding the $650,000 loss suffered by Imperial Savings to the $2,217,952 net loss to Resource Bank.[22] Godfrey contends that he could

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in the Presentence Investigation Report (PSR), we reject it. We have previously held that "a presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial court in making the factual determinations required by the Guidelines". *United States v. Robins*, 978 F.2d 881, 889 (5th Cir. 1992).

[22] Resource Bank originally disbursed approximately $31.2 million to buy worthless debentures from the conspirators, but all but $2,217,952 of that amount was later recovered when the Office of the Comptroller of the Currency stepped in.

not reasonably have foreseen these losses.

We consider this challenge frivolous. The Guidelines provide that a conspirator is accountable for the reasonably foreseeable actions of his or her co-conspirators.[23] Foreseeability, however, is not at issue when the defendant is held responsible for his own conduct, rather than the actions of his co-conspirators.[24] both of the financial transactions for which Godfrey was held accountable were organized and carried out by Godfrey

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[23] *See* U.S.S.G. § 1B1.3(a)(1)(B) & cmt. 2; *United States v. Devine*, 934 F.2d 1325, 1337 (5th Cir.), *reh'g denied*, 943 F.2d 1315 (5th Cir. 1991), *cert. denied*, --- U.S. ---, 112 S.Ct. 349, 116 L.Ed.2d 288 (1991), --- U.S. ---, 112 S.Ct. 911, 116 L.Ed.2d 811 (1992), --- U.S. ---, 112 S.Ct. 952, 117 L.Ed.2d 120 (1992), --- U.S. ---, 112 S.Ct. 954, 117 L.Ed.2d 121 (1992), --- U.S. ---, 112 S.Ct. 1164, 117 L.Ed.2d 411 (1992), --- U.S. ---, 112 S.Ct. 1197, 117 L.Ed.2d 437 (1992).

[24] *Compare* U.S.S.G. § 1B1.3(a)(1)(B) *with id.* § 1B1.3(a)(1)(A).

himself. We see no clear error in the district court's finding that a loss of $2,867,952 was attributable to Godfrey.

Godfrey's sentence is AFFIRMED.